

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-87:

LIVINGSTON SCHOOL DISTRICT
NO. 4 and 1,

Petitioner and Respondent,

- vs -

MONTANA EDUCATION ASSOCIATION/
LIVINGSTON CLASSIFIED
EMPLOYEES ASSOCIATION,

Respondent and
Counterpetitioner.

FINAL ORDER

The Findings of Fact, Conclusions of Law and
Recommended Order was issued by Hearing Examiner John Andrew
on May 4, 1988.

Exceptions to the Findings of Fact, Conclusions of Law
and Recommended Order were filed by Wm. Nels Swandal,
attorney for the Petitioner, on May 19, 1988.

Oral argument was scheduled before the Board of
Personnel Appeals on August 23, 1988.

After reviewing the record, considering the briefs and
oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exceptions to the Findings
of Fact, Conclusions of Law and Recommended Order are hereby
denied.

2. IT IS ORDERED that this Board therefore adopt the
Findings of Fact, Conclusions of Law and Recommended Order
of Hearing Examiner John Andrew as the Final Order of this
Board.

1 DATED this 2nd day of September, 1988.

2 BOARD OF PERSONNEL APPEALS

3
4 By Alan L. Joscelyn
5 Alan L. Joscelyn
Chairman

6 * * * * *

7 CERTIFICATE OF MAILING

8 I, Jennifer Jacobson, hereby certify
9 that a true and correct copy of this document was mailed to
the following on the 6th day of September, 1988:

10 William Nels Swandal
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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
EMPLOYMENT RELATIONS DIVISION
APPEALS BUREAU

IN THE MATTER OF UNIT CLARIFICATION NO. 2-87

LIVINGSTON SCHOOL DISTRICT)
NO. 4 and 1,)

Petitioner and Respondent,)

vs.)

MONTANA EDUCATION ASSOCIATION/)
LIVINGSTON CLASSIFIED)
EMPLOYEES ASSOCIATION,)

Respondent and)
Counterpetitioner.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing on the above matter was held on February 18, 1988 in Livingston, Montana before John Andrew, hearing examiner. Emilie Loring represented the Montana Education Association/Livingston Classified Employees Association. William Nels Swandal represented Livingston School District No. 4 and 1. Documents were offered and testimony was taken from Claudia Spicer; William Adamo, business manager and clerk; Gaylord Lasher, superintendent; and Pat Boyer, special services director.

The matter was briefed and submitted on March 15, 1988.

1 II. ISSUES

2 Whether the unit clarification counter-petition
3 concerning the payroll clerk is properly before the Board of
4 Personnel Appeals.

5 Whether the positions of payroll clerk, accounting
6 clerk/secretary and special services secretary are confiden-
7 tial employees as defined in 39-31-103 (12) MCA and should
8 therefore be excluded from the bargaining unit.

9
10 III. FINDINGS OF FACT

11 1. The payroll clerk and accounting clerk/secretary
12 positions are employed in the central office of the
13 Livingston school district. The special services secretary
14 works in the Lincoln school building.

15 2. There are four clerical type positions (five
16 people including the superintendant's secretary) in the
17 central office building. There are two clerical positions
18 in the special services office.

19 3. William Adamo is the business manager and clerk
20 for the school district. Mr. Adamo certifies elections and
21 supervises food service operations as well as building and
22 grounds operations. He is the district's chief budget and
23 finance officer and as part of his duties develops budget
24 requests and recommendations on expenditures. In the
25

1 general field of labor relations he updates and maintains
2 personnel files and has been involved in the development of
3 job descriptions. He makes recommendations for hiring and
4 firing of non-staff and custodial personnel.

5 4. The payroll clerk and accounting clerk/secretary
6 positions are supervised by Mr. Adamo.

7 5. Mr. Adamo has never been a member of the negoti-
8 ating team for collective bargaining purposes. The
9 negotiating team usually consists of three to four board
10 members and the superintendant with his secretary (excluded
11 from the unit) in attendance. Mr. Adamo has been involved
12 in negotiation sessions when and if called upon to do so by
13 Board. The last time he was actually at a negotiating
14 session was 1983.

15 6. Mr. Adamo helps formulate responses to grievances.
16 The actual responses are usually oral and are done by the
17 superintendant.

18 7. Pat Boyer is the special services director. He
19 prepares budgets for the special services program of the
20 Livingston school district and Park county special education
21 cooperative. Approximately 75% of his time is devoted to
22 district business and the remainder to cooperative matters.
23 He sits as the director of the special education cooperative
24 advisory board, a board made up of superintendants from all
25 schools in the county. The special services secretary is

1 supervised by Mr. Boyer.

2 8. MEA/LEA represents the employees of the special
3 education cooperative. The district contract is the
4 cooperative contract. Mr. Boyer has never been a member of
5 the negotiating team for collective bargaining purposes.

6 9. All proposals for collective bargaining come from
7 the superintendent's office. As part of the preliminary
8 process of submitting proposals, Mr. Adamo and Mr. Boyer
9 submit their ideas to the superintendent. Finalized
10 proposals are typed by the superintendant's secretary.

11 10. Mr. Boyer's secretary sat in both open and closed
12 sessions of the special education cooperative. She has
13 taken minutes of these meetings and has been privileged to
14 closed sessions. In some instances these sessions might
15 concern personnel matters but as Mr. Boyer testified it is
16 not that often that his secretary is involved in matters
17 that concern labor relations matters.

18 11. The district submitted as evidence a cost out made
19 by the payroll clerk based on a projected 2% pay increase.
20 This cost out is based upon information which is all public
21 in nature, i.e., placement of individuals on the salary
22 schedules and current rates of compensation. Preparation of
23 a document of this nature does not require access to
24 confidential information nor is it convincing proof that the
25 payroll clerk is in a special position where she is privy to

1 Board bargaining strategy or Board proposals. All she is
2 privy to is the cost of a certain program.
3

4 IV. CONCLUSIONS OF LAW

5 1. The current bargaining unit for Livingston School
6 District No. 1 and 4 is recognized as clerical employees and
7 custodial employees of the employer excluding the payroll
8 clerk and the superintendent's secretary. The unit
9 description has been a difficulty in the past when MPEA was
10 the exclusive bargaining agent and remained a problem when
11 MEA/LCEA became the bargaining agent. As a result of this
12 difficulty the district and the union agreed to submit the
13 question of the status of two positions - special services
14 secretary and accounting clerk/secretary - to the Board of
15 Personnel Appeals (BOPA) for resolution.

16 The request for unit clarification was submitted by the
17 District and was followed by a counter-petition by the Union
18 requesting the payroll clerk be included in the unit.
19 Neither the petition nor the counter-petition were filed
20 within the timelines of 24.26.630 ARM. Since the parties
21 had agreed to a waiver of the timelines to get the unit
22 description clarified it is not now reasonable to hold the
23 parties to a technical reading of the rules as applied to
24 the counter-petition. This is especially true given that
25 the District did not raise this as an issue until the time

1 of hearing; neither party is prejudiced; BOPA's rules allow
2 for such a waiver, (24.26.217 ARM); such a request would at
3 this date be timely; and to do otherwise would be an
4 unnecessary hardship on the association, the district, and
5 the Board's resources. The Board therefore assumes
6 jurisdiction over the counter-petition.
7

8 2. The Collective Bargaining Act for Public Employees,
9 39-31-103, et seq., MCA provides an exclusion for
10 confidential labor relations employees. In determining
11 confidential status the Board has looked to decisions of the
12 NLRB as well as federal court precedent. This practice has
13 been recognized in many decisions of the Montana Supreme
14 Court.

15 In Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1946) the
16 NLRB stated:

17 "...it is our intention to limit the term confidential,
18 so as to embrace only those employees who assist and
19 act in a confidential capacity to persons who exercise
20 managerial functions in the field of labor relations."

21 In B.F. Goodrich Co., 115 NLRB 103, 37 LRRM 1383 (1956)
22 the NLRB again adopted the definition contained in Ford
23 Motor and went on to state:

24 "...any broadening of the term confidential as adopted
25 in that decision [Ford] needlessly precludes employees from

1 bargaining collectively together with other employees
2 sharing common interests. Consequently, it is our intention
3 herein and in future cases to adhere strictly to that
4 definition..."

5 From these policy statements and related court cases,
6 particularly Siemens Corp., 224 NLRB 1579, 92 LRRM 1455,
7 (1976) and NLRB v. HCREMC, 454 U.S. 170, 108 LRRM 3105
8 (1981), a two prong test has evolved. Part one provides
9 that the confidential employee must assist an official who
10 formulates, determines, and effectuates labor relations
11 policies. The second prong provides that the confidential
12 employee must have access to confidential labor relations
13 information in the normal course of his/her employment.
14 This test is in the conjunctive and has been adopted and
15 utilized by the Board of Personnel Appeals. See, for
16 example, UD#24-79 and UD#8-80. It is a test that the NLRB
17 in such cases as Dun and Bradstreet, 240 NLRB 16, 100 LRRM
18 1297 (1979), B.F. Goodrich, supra, and Los Angeles New
19 Hospital, 244 NLRB 960, 102 LRRM 1189 (1979) and BOPA in
20 UD#7-80 have recognized should be viewed in the context that
21 the confidential category is a narrow one.

22 In applying the above criterion to the instant case the
23 first question to be answered is whether the special
24 services director and the business manager, as supervisors
25 of the positions in question formulate, determine and

1 effectuate labor relations policy. Presence at the
2 bargaining table is a strong indicator of an official who is
3 involved in the formulating, determining and effectuating of
4 labor relations policy, UC# 6-79. The special services
5 director has never sat at the table. The business manager
6 last sat at the table in 1983 and did so then only at the
7 request of the negotiating team, a fact that casts
8 considerable doubt on how substantial his involvement is in
9 labor relations matters. In short, the facts adduced at
10 hearing lead to the conclusion that the business manager and
11 the special services director do have responsibilities in
12 the general field of labor relations, but labor relations is
13 not their prime area of endeavor. They are advisors and
14 resource people whose subordinates do not meet the defini-
15 tion of confidential. See such cases as Weyerhaeuser Co.,
16 173 NLRB 177, 67 LRRM 1533 (1968); Flintkote Co., 219 NLRB
17 85, 89 LRRM 1295 (1975); UD#27-79; and UD#1-80 where the
18 BOPA stated:

19 "If the superior cannot pass the test neither can an
20 assistant, i.e., there can be no confidential labor
21 relations employee unless the boss passes the muster."

22 As previously stated, the test for confidential
23 exclusion is two part. Livingston School District No. 1 and
24 4 has not shown that the first part of the test has been met
25 and that the employees in question are confidential.

1 Nonetheless part two of the test will be addressed.

2 At the onset it should be noted that the secretary to
3 the superintendant is excluded from the unit and thus
4 available to handle any confidential labor relations
5 matters. With that as a preface the positions in question
6 will be briefly addressed.

7 The three positions do all have access to confidential
8 personnel records. This in and of itself is insufficient
9 grounds for exclusion. See UD#27-79 and Taft Broadcasting,
10 226 NLRB 87, 94 LRRM 1089 (1976) and Beatrice Foods, 224
11 NLRB 191, 92 LRRM 1402 (1976).

12 In the case of the payroll clerk the example of
13 confidential labor relations related work provided by the
14 district is not convincing. The clerk did cost out a
15 possible salary proposal. However, the information was
16 prepared from information which is public in nature.
17 Moreover, anyone, and certainly a negotiating team who had a
18 list of current salaries - again public information - could
19 do a cost projection. It does not take a confidential
20 employee to do this and the fact that the negotiating team
21 may have requested a certain cost out does not necessarily
22 mean that that cost out reflects a bargaining position.

23 The special services secretary's job description is
24 lacking in any duty that could be deemed confidential. At
25 best the testimony shows that she takes minutes at the

1 occassional closed meetings of the cooperative advisory
2 boards, might type a grievance response, and does assist in
3 budget work. None of these duties could be described as her
4 primary duty and again, even if they were, she does not
5 assist a person who formulates, determines and effectuates
6 labor relations policy.

7 As to Mr. Adamo's secretary, perhaps three items on her
8 job description could relate to what might be deemed
9 confidential information. Two items deal with budget
10 matters and as with the payroll clerk are all a matter of
11 public record. The other item relating to performing typing
12 for the business manager is best summed up by the
13 description itself only one part of which "typing and
14 distribution of teacher and administrative contracts" is
15 even vaguely confidential. That reference and the testimony
16 offered at hearing are simply not conclusive.

17 The positions of accounting clerk/secretary, payroll
18 clerk, and special services secretary are not confidential
19 as defined in 39-31-103 (12) MCA.

20
21 V. RECOMMENDED ORDER

22 It is recommended that the positions of accounting
23 clerk/secretary and special services secretary be included
24 in the bargaining unit.

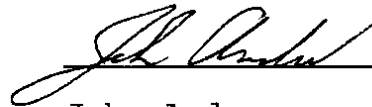
25 It is further recommended that the description of the

1 bargaining unit be clarified to no longer exclude the
2 position of payroll clerk.
3

4 Entered and dated this 4th day of May,
5 1988.
6

7 BOARD OF PERSONNEL APPEALS

8 by
9

10
11
12 

13 John Andrew

14 Hearing Examiner
15

16 NOTICE: Exceptions to these Findings of Fact, Conclusions
17 of Law and Recommended Order may be filed within twenty (20)
18 days of service. If no exceptions are filed the Recommended
19 Order will become the Order of the Board of Personnel
20 Appeals.
21
22
23
24
25

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was served upon the following on the 5th day of May, 1988, postage paid and addressed as follows:

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